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The Treaty-Making Power of the United States and Alien Land Laws in States

THE purpose of this paper is to show that the Constitution of the United States does not vest any authority in the President with the advice and consent of the Senate to enact a treaty between the United States Government and any foreign country which in any way, remotely or otherwise, restricts the sole and absolute right of the States of the United States to regulate and control the leasing and ownership of real estate situated within their boundaries, the title of which is owned by citizens thereof or by the States.

I.

NATURE AND EXTENT OF THE TREATY-MAKING POWER OF THE GOVERNMENT OF THE UNITED STATES.

The Constitution says that the President "shall have power, by and with the advice . . . of the Senate to make treaties, provided two-thirds of the senators present concur."¹

The President may, before negotiating a treaty, ask the Senate for advice, and his right to do so has never been disputed.²

The Senate may amend a treaty laid before it without rendering it unconstitutional.³ But the President is not bound to obey the request. The expression of such a wish is without doubt also within the power of the House of Representatives.⁴

Hence, the sole authority of the government of the United States to enter into the contractual relation (to enact a treaty) with a foreign country is vested by the Constitution in the President. The President may be defeated in consummating such a contract if two-thirds of the senators present disapprove the

¹ Art. II, § 2, 2.

² Washington did so repeatedly, and Polk did it in 1846 in the case of the treaty with England relative to Oregon. Von Holst's Constitutional Law of the United States (1887), p. 201.

³ See Gadsden Treaty of December 30, 1853. Von Holst's Constitutional History, Vol. v, pp. 6-9.

⁴ Von Holst's Constitutional Law of The United States, pp. 201-202.

treaty, but the said two-thirds of the senators cannot consummate a valid treaty without the President's signature to the same.^{4a}

It is trite to say that the Constitution consists solely of enumerated powers. But the subject matter of any treaty entered into by the President on behalf of the United States with foreign nations, must come within the enumerated powers vested in the President and Congress as expressed by the Constitution. Hence, any treaty stipulation which is inconsistent with the provisions of the Constitution is inadmissible, and, according to constitutional law, *ipso facto* null and void. But as a noted writer has said:

"Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation the treaty-power of the President with the concurrence-power of the Senate bears to the legislative power of Congress. This question is answered by saying that these powers must be co-ordinate, for treaties like laws are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself."⁵

It follows from this principle that a law can be repealed by a treaty,^{5a} as well as a treaty by a law.⁶ If a law and a treaty are in conflict, their respective dates must decide whether the one or the other is to be held as repealed.⁷ "The courts of the United States cannot hold a law unconstitutional upon the ground that it violates treaty obligations. Such a question is an international one, to be settled by the foreign nations interested therein and the political department of the Government."⁸

^{4a} "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the execution of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive." Hamilton, in *The Federalist*, No. LXXV.

⁵ *Id.*, 202.

^{5a} *Foster v. Nielson* (1829), 2 Pet. 253, 7 L. Ed. 415.

⁶ *The Cherokee Tobacco* (1870), 11 Wall 616, 20 L. Ed. 227.

⁷ *Foster v. Nielson*, *supra*, n. 5a; *Doe et al. v. Braden* (1853), 16 How. 635, 14 L. Ed. 1090.

⁸ *Gray v. Clinton Bridge*, 7 Amer. Law Reg. (N. S.), 151; *Hammond I*, 22, § 54.

The rule for determining the extent of the treaty-making power of the United States is, then, that the treaty-making power of the President of the United States, with the concurrence-power of the Senate, and the legislative power of Congress are co-ordinate powers, both being "sovereign acts"—and differ from laws only in form and in the organs by which the sovereign will expresses itself. The rule laid down in the case of *Foster v. Neilson* has been consistently affirmed in a long line of cases; also the rule established in the *Cherokee Tobacco Cases*, just stated, has been approved by an unbroken chain of decisions.

II.

CASES WHICH ILLUSTRATE THE LIMITATION OF THE EXTENT OF THE TREATY-MAKING POWER AND THE PRINCIPLES UNDERLYING THE SAME.

A treaty is primarily in its nature a contract between nations,⁹ and not a legislative act.¹⁰ A treaty with the United States is, however, more than a contract between nations,¹¹ being, as declared by the Constitution of the United States,^{11a} the supreme law of the land, and binding upon all courts both state and federal.¹²

The treaty-making power of the United States is, as expressed in the Constitution, unlimited,¹³ and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the States.¹⁴ To what extent it is thus limited has been considerably discussed without being definitely defined,¹⁵ no treaty having ever been declared by the courts to be void.¹⁶ It would seem clear, however, that the treaty power does not extend so far as to authorize what the Constitution forbids,¹⁷ or a change in the character of the govern-

⁹ *Foster v. Neilson*, supra, n. 5a.

¹⁰ *Eddy v. Robertson* (1884), 112 U. S. 580, 28 L. Ed. 798, 7 Sup. Ct. Rep. 247.

¹¹ *Foster v. Neilson*, supra, n. 5a.

^{11a} Art. VI.

¹² *U. S. v. Rauscher* (1886), 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. Rep. 234; *Minnesota Canal etc. Co. v. Pratt* (1907), 101 Minn. 197, 112 N. W. 395.

¹³ *DeGeofroy v. Riggs* (1889), 133 U. S. 258, 28 L. Ed. 974, 5 Sup. Ct. Rep. 453.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Ware v. Hylton* (1796), 3 Dall. 199.

¹⁷ *Supra*, n. 13.

ment or in that of the States,¹⁸ and it has also been stated that it would not authorize a cession of any portion of the territory of a State without the consent of that State.¹⁹

Acts of Congress in conflict with treaties. An act of Congress cannot be declared unconstitutional or void because it is in conflict with the provisions of a prior treaty, for a statute is a law equal with a treaty and if subsequent and conflicting with the treaty supersedes the latter. This is the holding of the court in *Horner v. United States*,²⁰ where it was contended that section 3894, United States Revised Statutes, was unconstitutional and void because it was a violation of a treaty between the United States and Austria.

"So far as a treaty, made by the United States with any foreign nation, can be made the subject of judicial cognizance, in the courts of the country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."²¹

There is no Federal probate law. The Supreme Court of the United States in construing the provisions of the Italian Treaty of May 8, 1878, and the Argentine Treaty of July 27, 1853, respecting the appointment of administrators of estates of deceased aliens says:

"The most-favored-nation clause in the Italian Treaty of May 8, 1878 (20 Stat. at L. 732), does not give an Italian Consul General the right to administer the estate of an Italian citizen dying intestate in one of the States of the United States, to the exclusion of the one authorized by the local law to administer the estate, because of the privilege conferred by the Argentine Treaty of July 27, 1853 (10 Stat. at L. 1009), art. 9, upon the consular officers of the respective countries as to citizens dying intestate, 'to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs,' since this provision, if applicable, cannot be construed as intended to supersede the local law as to the administration of such estates."²²

¹⁸ Id.

¹⁹ Id.

²⁰ (1892), 143 U. S. 570, 36 L. Ed. 266, 12 Sup. Ct. Rep. 522.

²¹ *Whitney v. Robertson* (1888), 124 U. S. 190, 31 L. Ed. 386, 8 Sup. Ct. Rep. 456; *Head Money Cases*, supra, n. 10; *Chinese Exclusion Case*, *Ping v. U. S.* (1889), 130 U. S. 581, 32 L. Ed. 1068, 9 Sup. Ct. Rep. 623.

²² *Rocca v. Thompson* (1912), 223 U. S. 317, 56 L. Ed. 453, 32 Sup. Ct. Rep. 207.

In the second paragraph of the syllabus of the *Rocca case* just cited the court says: "There is no Federal probate law, but the right to administer the property left by a foreigner within the jurisdiction of a state is primarily committed to state law." This is the law in the United States, from which there is no appeal. There is nowhere in the Constitution or its amendments any authority vested in Congress to enact a law assuming charge of the administration of estates under the jurisdiction of the states, nor authorizing the President to make a treaty containing provisions vesting anyone with authority to administer estates of deceased aliens to the exclusion of those specified by the state law, notwithstanding the query raised by the court in the *Rocca case*, viz., "whether it is within the treaty-making power of the national government to provide by treaty with foreign nations for administration of property of foreigners dying within a state and to commit such administration to consuls of the nation to which deceased owed allegiance."

Thus we have established a second proposition: That neither the treaty-making power nor the Congress of the United States has assumed (nor attempted to assume) jurisdiction over those property rights which are incident to the administration of estates of deceased aliens, by vesting foreign consuls with rights prior and exclusive of the rights of those persons named in the state statutes, and over which the state legislatures have always exercised jurisdiction through the administration of their laws of probate—a sovereign right of the states which relates solely to matters of local interest.

Validity of Chinese Exclusion Acts. The act of Congress of October 1, 1888, prohibiting entry into the United States of Chinese laborers who had departed before its passage, and who had certificates issued under the act of 1882 as amended by the Act of 1884, granting them permission to return, is valid. Although it is in contravention of express stipulations of the Treaty of 1868, and of the Supplemental Treaty of 1880, the Act of 1888 is not on that account invalid or to be restricted in its enforcement, for treaties are of no greater legal obligation than an Act of Congress, and are subject to such acts as Congress may pass for their enforcement or repeal. Moreover, the government of the United States, through the action of the legislative department, can exclude aliens from its territory, although no actual hostilities

exist with the nation of which the aliens are subjects. The power of exclusion of foreigners is an incident of sovereignty and the right of its exercise cannot be granted away or restrained on behalf of any one.

In the case of *Chae Ping v. United States*,²³ the court lays down the rule, in its own language, which determines the extent of the treaty-making power of the President with the concurrence-power of the Senate and the co-ordinate power of Congress in its relation thereto, in the following language:

"The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."

In the same case the court defines the distinction between the governmental control of local matters, which are left to local authorities, and of national matters which are entrusted to the national government, as follows:

"The control of local matters being left to local authorities, and national matters being trusted to the Government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

III.

APPLICATION OF THESE PRINCIPLES TO THE TREATY OF APRIL 5, 1911, WITH JAPAN, AND TO THE RECENT ALIEN LAND ACTS OF CALIFORNIA.²⁴

Treaty and statutory provisions. All rights of the citizens of the States of the United States which were not granted to the

²³ *Ping v. U. S.*, supra, n. 21.

²⁴ Cal. Stats. 1913, ch. 113.

Federal Government and embodied in the Constitution of the United States are retained by them and may be exercised through acts of the legislatures of the several states. There is no grant of authority in the Constitution of the United States authorizing Congress to enact laws specifying who may and who may not hold or purchase the title, or hold and lease the uses of lands owned by citizens of the United States. If the people of the United States had granted this authority in the Constitution, then Congress could pass a constitutional law denying any alien the right to purchase and own land used for agricultural purposes, or lease the use of agricultural lands lying within the boundaries of the several states over which they now exercise jurisdiction.

Article I of the treaty between the United States and the Empire of Japan proclaimed April 5th, 1911, reads:

"The citizens or subjects of each of the High Contracting Parties, shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, and employ agents of their own choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Therefore, since such rights have not been granted by the Constitution to Congress, but retained by the people, they have the legal right to enact state laws, which prohibit aliens who are ineligible to become citizens of the United States, from owning lands used for agricultural purposes and from leasing the same for a period of more than three years.

These provisions of the California Land Tenure Act complained of are the following:

"An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith. (Approved May 19, 1913. In effect August 10, 1913.)

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of the state.

Section 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

Section 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

The issue raised by the enactment of the California Land Tenure Act (1913) cited above, was stated by Honorable Frank B. Kellogg, who, after citing sections two and three of the California Act and Article I of the treaty between Japan and the United States (1911), states the problem in the following language:

"The question raised, which has received such wide discussion by publicists and journalists, is whether a state may, in violation of a treaty between the United States and a foreign power, regulate the ownership of real estate within its borders by citizens of such foreign country.

"I shall not stop to discuss the question of whether the treaty with Japan does give to her citizens within the United States the right to own real estate. It gives them the right to carry on trade, to own houses, manufactories, warehouses and shops, and to lease land for residential and commercial purposes. If citizens of Japan have any right to own real estate in California, it is difficult to see how this law takes away such right, because it provides in substance that such aliens may acquire, possess, enjoy and transfer real estate in the manner and to the extent and for the purposes prescribed by any treaty.

"But the question has been squarely raised by the declaration of the legislature of California which was intended and understood by the public generally to mean that California claimed such right notwithstanding any treaty provisions with the federal government."^{24a}

Mr. Kellogg then undertook to show that the power vested with the President and the concurrence-power of the Senate to make treaties is very broad, and sufficiently broad to repeal and annul the Land Tenure Acts of California, or any similar acts that might be passed by other states. We undertake in this paper to refute this position.

The State's interest in land: law of escheat. In the United States where a citizen of a state dies without heirs and intestate, his personal property as well as his realty,²⁵ and generally all his property rights, escheat to the state.²⁶ Hence, where a state has passed title of land to a purchaser, and likewise where the United States has sold land to a citizen of a state, and at some point in the line of descent of the title a holder thereof dies without heirs and intestate, not only the title to the realty but also that of the personal estate of the deceased passes to the state. The state, therefore, at all times owns a contingent interest in the lands and personal property owned by its citizens. On the other hand, the federal government has no such interest. Even where, to evade the law prohibiting an alien from holding land, an alien purchases real estate in the name of a trustee on an express trust to permit the alien to take and receive rents and profits, the interest in such trust belongs to the state.²⁷

In the United States property escheats directly to the state as the sovereign power within whose jurisdiction it is situated,²⁸ unless the state has by statute directed otherwise.²⁹ In some states the statutes provide that the escheat shall be to the county,³⁰ or town,³¹ where the property is situated. Land held by grant from the general government in a territory escheats to the United

^{24a} Address of Hon. Frank B. Kellogg, Report Am. Bar Assn., 1913, pp. 332-333.

²⁵ Johnson v. Spicer (1887), 107 N. Y. 185, 13 N. E. 753.

²⁶ Id.

²⁷ Liggett v. Dubois (1835), 5 Paige (N. Y.) 114.

²⁸ State v. Reeder (1876), 5 Nebr. 203; Hamilton v. Brown (1896), 161 U. S. 256, 40 L. Ed. 691, 16 Sup. Ct. Rep. 585.

²⁹ Haigh v. Haigh (1868), 9 R. I. 26.

³⁰ Meadowcroft v. Winnebago County (1899), 181 Ill. 504, 54 N. E. 949; Pacific Bank v. Hannah (1898), 90 Fed. 72.

³¹ Supra, n. 29.

States,³² unless prior to the escheat the territory has been admitted as a state.³³ In Canada property escheats to the province in which it is situated, and not to the Dominion.³⁴ It is to be noted here that under the British Contract of North America, under which the government of the Dominion of Canada is governed, there are no constitutional limitations, while in the United States our government is administered under dual forms of constitutional limitations, those of the states and that of the United States.

Thus in the proper exercise of the treaty-making power by the Dominion Government of Canada, and much less by that of the United States, there is no authority to control or limit the control of the title or leases of lands of citizens of the state, by treaty for the absolute control of the same is vested in the legislative authority of the citizens of the states.

Not only is there no authority vested by the constitution in Congress to enact laws undertaking to control the title to lands or leases thereof, or even of that of personal property, but also the law of escheat of real and personal property shows conclusively in its development in the United States and the States thereof, that Congress has no authority to pass laws undertaking to control the title of personal and real property within the jurisdiction of the states, and has never undertaken to exercise such authority, outside of levying taxes for national purposes.

Social and economic phases of the problem. The basis for the public sentiment which is expressed by the vote of the General Assembly in 1913, in passing the land tenure acts prohibiting aliens incapable of becoming citizens of the United States from purchasing and leasing lands in the State of California for a period exceeding three years, by the extraordinary majority of one hundred and seven for to five against, may perhaps be fairly stated in the language of Mr. MacFarlane, correspondent of Collier's on June 7, 1913, commissioned to investigate the matter on the ground, who says:

"It was the small fruit farmer of California fighting for his home and for his American community life against submergence by an Asiatic social and industrial order which

³² *Church of Jesus Christ v. U. S.* (1889), 136 U. S. 1, 34 L. Ed. 478, 10 Sup. Ct. Rep. 792.

³³ *Ethridge v. Doe* (1851), 18 Ala. 565.

³⁴ *Attorney General v. Mercer* (1883), 8 App. Cas. 767.

forced the Anti-alien land bill through the California Legislature. Some of the most beautiful rural districts in the State were in jeopardy. . . . The blame must be laid upon these protesting farmers who refused to stand idly by and see themselves forced out of the homes they had built, off the ranches they had tilled, out of the communities in which their children were being reared.

"In other words, the coming of Japanese into possession of control of the farms of a given community occasions a reduction of white labor employed by approximately 90 per cent.,—which practically means obliteration.

"The second blighting effect is through social pressure. There is little use to argue or speculate over whether the two races should dwell together in brotherly affection. The fact is that they will not.

"The Japanese—without meaning any disrespect to the little brown man—does not commend himself to the average American farmer family as a desirable neighbor. He is not overly clean. He is accused of being unmoral. It is claimed the Japanese have no marriage tie as we know the institution. Women, if scarce, may be held pretty much in common. The white farmer's wife does not run in and sit down to gossip with the Japanese farmer's wife and she does not want the Japanese farmer's wife running in to gossip with her. Their children cannot play together. Jenny Brown cannot go for a buggy ride with Harry Hiralda. The whole idea of social intercourse between the races is absolutely unthinkable. It is not that the white agriculturist can not compete with the Japanese agriculturist. It is that he will not live beside him."

State's control over tax fund: Prohibition of alien labor on public works. The Supreme Court of the United States in *Heim v. McCall*³⁵ has held that the equality of rights and privileges with citizens of the United States, with respect to security for persons and property, which citizens of Italy are assured by the Italian Treaty of February 26, 1871 (17 Stat. at L. 845), is not infringed by the provisions of New York Consolidated Laws, Chap. 31, Sec. 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York State must be given preference. (For other cases see Treaties, I. in Digest Sup. Ct. 1908).

"Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with

³⁵ (1915), 239 U. S. 175, 60 L. Ed. 206, 36 Sup. Ct. Rep. 78.

Italy is the one especially applicable, for the aliens employed are the subjects of the King of Italy. By that treaty (1871) it is provided:

"The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives.' (17 Stat. at L. 846).

"There were slight modifications of these provisions in the treaty of 1913, as follows: That 'the citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant security and protection for their persons and property and for their rights' (38 Stat. at L. 1670).

"Construing the provision of 1871, the court of appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys'. The conclusion (194) is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power, and we have precedents to guide construction. The treaty with Italy was considered in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 58 L. Ed. 539, 544, 34 Sup. Ct. Rep. 281, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shot-guns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property'. And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject matter,—a power which exists in the case at bar, as we have seen.

"From these premises we conclude that the labor law of

New York and its threatened enforcement do not violate the 14th Amendment or the rights of plaintiffs in error thereunder, nor under the provisions of the treaty with Italy."

The case *Crane v. The People of the State of New York*⁸⁶ was argued and submitted with the case *Heim v. McCall* cited above. It involved the same criminal feature of Section 14 of the labor law of the state, which was the subject of the opinion in the Heim case. The public work was the construction of catch or sewer basins. The defense was the unconstitutionality of the law, and that it was in violation of the treaties of the United States with foreign countries. One of the workmen employed by the defendant was a subject of the King of Italy.

The provisions of the treaty with Italy set out in the Heim case and similar provisions of other treaties, as well as the treaty between United States and Italy signed February 25, 1913,⁸⁷ were received in evidence. The court sustained the New York Statute for the same reasons as given in the Heim case.

The Heim and Crane cases just discussed establish the rule that the State of New York, or any other state, has the sovereign right to prohibit aliens from being employed on public works, on the principle that the citizens of the states contribute the funds through taxes levied on real and personal property, and therefore retain the right to prohibit aliens from the benefits arising by being employed on public works of the state, and limit the preference in such employment to the citizens of that state. Much more, therefore, have the citizens who own the lands of the state, thus taxed for public purposes, the sovereign right to deny aliens the right to purchase or lease lands from citizens of the state, limiting not only the benefit of purchasing and leasing the lands of the states to citizens of the United States, but also the social, moral and economic benefits of the community life of the state to its citizens and those of other states.

State's right to control use of wild game in contravention of treaty provisions. An additional fundamental principle has been affirmed by the Supreme Court of the United States, in defining the limitations and scope of the treaty-making power of the President and Senate in sustaining a statute of Pennsylvania prohibiting aliens from killing wild game. In the case *Patson v. Commonwealth of Pennsylvania*⁸⁸ the court held:

⁸⁶ (1915), 239 U. S. 195, 60 L. Ed. 218, 36 Sup. Ct. Rep. 85.

⁸⁷ 238 Stat. at L. 1669.

⁸⁸ (1914), 232 U. S. 138, 58 L. Ed. 539, 34 Sup. Ct. Rep. 281.

"A resident unnaturalized Italian not trading in firearms cannot claim that his right under the treaty with Italy of February 26, 1871 (17 Stat. at L. 845), art. 2, to carry on trade and to do anything incident to it upon the same terms as the natives of this country, is infringed by Pa. laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and 'to that end' making it unlawful for any such person to own or be possessed of a shotgun or rifle.

"The equality of rights and privileges with natives of the United States with respect to security for persons or property which citizens of Italy are assured by the Italian Treaty of February 26, 1871, art. 3, is not infringed by the provisions of Pa. laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and 'to that end' making it unlawful for any such person to own or be possessed of a shotgun or rifle."

Keeping in mind the statement of conditions under which the California Land Tenure Acts were passed, we direct, in particular, attention to what the court said at p. 144: "Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. *Adams v. Milwaukee*, 228 U. S. 572"; and again at pp. 145-146:

"The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for (146) its own citizens if it pleases. *Geer v. Connecticut*, 161 U. S. 519, 529, 40 L. Ed. 793, 797, 16 Sup. Ct. Rep. 600. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent. *Compagnie Francaise de Navigation & Vapeur v. State Bd. of Health*, 186 U. S. 380, 394, 385, 46 L. Ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811."

We have seen in the law of escheat that the state at all times retains an interest in the property of the state, personal and real. In the case of wild game it only becomes the property of the citizens of the state when reduced to the possession of the individual who killed or purchased it. Here the Supreme Court holds that the citizens of a state can prohibit aliens from killing wild game and limit that benefit to citizens of the state.

For a greater reason, therefore, have the citizens of the state, who together own the entire property of the state, by the legislative authority of the state, the right to prohibit aliens from acquiring the title of, and leases for more than three years of land situated within the state, especially so as to preserve the social, moral and economic conditions compatible with the civilization being developed within the state and country.

The State is a social compact. Chief Justice Waite in *Munn v. Illinois*,³⁹ in defining "a body politic," quotes from the Preamble of the Constitution of Massachusetts, "A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Applying this principle to the foregoing set of facts, it follows that: Just as every citizen has a right to determine what neighbor's children shall exercise the privilege of associating with his own children within his yard, so have all the citizens of the state, through their legislative body, the right to regulate and control moral, social and economic principles which locally threaten the destruction of the social and moral fabric of their community life.

To hold that the treaty-making power is vested with the authority to repeal the California Land Tenure Acts is to deny the sovereign authority of the state the right, as defined above, to regulate matters of strictly local, social, moral and economic concern.

Should our supreme court sustain such a treaty, it would make precisely the same blunders it made in the *Dred Scott Decision*,⁴⁰ when it held that though Sanford took Scott and his wife from Missouri, a slave state, into Illinois, a free state, where Scott resided and reared his children for several years, that Scott was still a slave, a chattel. This decision repudiated the presumption of law that there were legally free and slave states according to the will of the majority of the citizens of the states.

From what precedes it follows as merely a matter of logic that there is no authority vested in the treaty-making power to limit or repeal the right of the states to prohibit aliens from owning lands or leasing the same, for agricultural purposes, for more than three years; for

In the first place, the treaty-power of the President with the

³⁹ (1877), 94 U. S. 113, 24 L. Ed. 77.

⁴⁰ (1856), 60 U. S. 393, 15 L. Ed. 691.

concurrence-power of the Senate, is a power co-ordinate with the legislative power of Congress, and treaties are no greater legal obligations than acts of Congress; acts of Congress and treaties made in pursuance of the Constitution under the authority of the United States are both the law of the land, but no paramount authority is given to one over the other, the scope of the one is no greater than that of the other.

Congress has no authority over the administration of estates within the jurisdiction of the same to the exclusion of state authorities; no authority over the control of the title of real and personal property of the citizens of the state or the public funds raised therefrom by taxation (beyond raising of funds by taxation for national uses); nor has Congress any authority over the control and regulation of the social, moral and economic condition of citizens locally peculiar to individual states and parts thereof.

Therefore, since the scope of the treaty-making power extends no farther than the authority of acts of Congress, there is no authority vested in the treaty-making power to repeal acts of state legislatures, denying aliens the right to purchase and lease lands from citizens of the state.

The scope of authority with which the diplomatic representatives of foreign countries is vested, is as a rule vastly broader than that of the diplomatic representatives and the President of the United States. This is due to the limitations to the exercise of the treaty-power fixed by the Constitution of the United States. Therefore, the diplomatic representatives and the President of the United States, in contemplating negotiations, are in duty bound to acquaint diplomatic representatives of foreign countries with these limitations when negotiations begin.

In case the diplomatic representatives of the United States have executed a treaty which contains provisions in contravention of the Constitution of the United States, such provisions are not binding upon the people of the United States. The issue then raised is one between the political departments of the countries interested to be adjusted peacefully or by war.

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